IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. CIRILO FLORES, Defendant.	CRIMINAL ACTION NO. 12-0186-01

OPINION

Slomsky, J. **November 14, 2014**

I. INTRODUCTION

Before the Court is Defendant Cirilo Flores's Motion to Withdraw His Guilty Plea. On October 10, 2013, Defendant pled guilty to a Superseding Information (Doc. No. 114) charging him with one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). (Doc. No. 136 at 50:6-11.) Defendant's guilty plea was entered pursuant to a Guilty Plea Agreement between Defendant and the Government which required the Court to impose a sentence of forty-six months imprisonment and other conditions if the Court accepted the Agreement. (Doc. No. 118 at 2.) On November 20, 2013, Defendant wrote a letter to the Court in which he asserted his innocence and notified the Court that he wished to withdraw his guilty plea. (Doc. No. 122.) For reasons that follow, Defendant's Motion to Withdraw His Guilty Plea will be denied.

II. BACKGROUND

A. The First Indictment, the Superseding Information, and the Guilty Plea Agreement

On April 19, 2012, Defendant was charged in a multiple count Indictment. (Doc. No. 1.) These charges involved persuading a minor, M.C.M., to engage in sexually explicit conduct for

the purpose of producing visual depictions of that conduct. This was the first indictment filed against Defendant. He was charged with eight counts of essentially using or inducing a child to pose for pornographic images and distributing those images in violation of 18 U.S.C. §§ 2251(a) and (e), 2252(a)(2) and (a)(4), and 2. (Id.) Counts 1-4 of the Indictment carried a mandatory minimum sentence of fifteen years imprisonment. See 18 U.S.C. § 2251(e). Counts 5-8 carried a mandatory minimum sentence of five years imprisonment. See 18 U.S.C. § 2252(b)(1).

Thereafter, on October 10, 2013, Defendant signed a Guilty Plea Agreement with the Government. (Doc. No. 118.) In the Agreement, the Government agreed to dismiss the original Indictment filed on April 19, 2012. (Id. at 2.) But as part of the Agreement, Defendant agreed to plead guilty to a Superseding Information (Doc. No. 114) charging him with

> one count of possession of child pornography, in violation of Title 18, United States Code, Section 2252(a)(4)(B) and (b)(2), all arising from his possession of approximately 22 images of M.C.M., a minor, engaging in sexually explicit conduct, from on or about October 6, 2010 through and including February 24, 2011.

(Doc. No. 118 at 1.)

The Guilty Plea Agreement was made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C),[1] and the parties agreed that the following sentence would be the appropriate disposition of this case:

> [F]orty-six (46) months incarceration, followed by a period of supervised release which shall not be less than five years, and may be as much as lifetime supervised release, [among other conditions] . . . .

[1] Federal Rule of Criminal Procedure 11(c)(1)(C) provides that a guilty plea agreement between a defendant and the government may specify that the attorney for the government will:

> (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(Id. at 2.)

The Guilty Plea Agreement provided that, if the Court "does not accept this plea agreement, then either the defendant or the government will have the right to withdraw from the plea agreement and insist that the case proceed to trial." (Id.)

The Agreement also contained the following clause:

> The defendant is satisfied with the legal representation provided by the defendant's lawyer; the defendant and this lawyer have fully discussed this plea agreement; and the defendant is agreeing to plead guilty because the defendant admits that he is guilty.

(Id. at 7.)

In addition, an Acknowledgment of Rights was attached to the Agreement and signed by Defendant and his attorney. (Id. at 9.) In this document, Defendant affirmed the following:

> I hereby acknowledge that I have certain rights that I will be giving up by pleading guilty.
>
> 1. I understand that I do not have to plead guilty.
> 2. I may plead not guilty and insist upon a trial.
> 3. At that trial, I understand [that I would have certain constitutional rights] . . . .

(Id.)

Thereafter, as noted above, Defendant pled guilty to the one-count Superseding Information. (Doc. No. 136 at 50:6-11.)

B. The Guilty Plea Colloquy

On October 10, 2013, Defendant was questioned while under oath by the Court in accordance with Rule 11(b) of the Federal Rules of Criminal Procedure, and entered a guilty plea

to the charge in the Superseding Information. (Doc. No. 136.) In accordance with each requirement of Rule 11(b), the Court determined that Defendant understood the following[2]:

A. The government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath. (Id. at 5:11-17.)

B. The right to plead not guilty, or having already so pleaded, to persist in that plea. (Id. at 36:4-9.)

C. The right to a jury trial. (Id. at 36:10-15.)

D. The right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding. (Id. at 35:14-21.)

E. The right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses. (Id. at 36:22-38:6.)

F. The defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere. (Id. at 39:10-14.)

G. The nature of each charge to which the defendant is pleading. (Id. at 42:5-43:21.)

H. Any maximum possible penalty, including imprisonment, fine, and term of supervised release. (Id. at 15:18-16:7.)

I. Any mandatory minimum penalty. (Id.)

J. Any applicable forfeiture. (Id. at 16:8-17.)

K. The court's authority to order restitution. (Id. at 29:18-23.)

L. The court's obligation to impose a special assessment. (Id. at 15:18-16:7.)

M. In determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that

[2] Under Federal Rule of Criminal Procedure 11(b)(1)(O), the court must also inform a defendant that, if convicted, "a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future." This provision is not applicable to the instant case because the Court determined that Defendant is a U.S. citizen. (Doc. No. 136 at 6:16-18.)

range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a). (Id. at 28:5-29:23.)

N. The terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence. (Id. at 21:7-23:5.)

Defendant acknowledged that he thoroughly discussed the Plea Agreement with his lawyer two days prior to the hearing, had enough time to review it with his lawyer, and was fully satisfied with his lawyer.[3]

> THE COURT: Are you fully satisfied with the representation of your lawyer?
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: All right. And did you read [the Guilty Plea Agreement] before signing it?
>
> THE DEFENDANT: On Tuesday, we went—or my lawyer came to see me, and we went over the content of the document.
>
> THE COURT: All right. And did you discuss the plea agreement thoroughly with her?
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: All right. Now, have you had enough time to talk over the plea agreement with your lawyer?
>
> THE DEFENDANT: Yes.

(Id. at 9:2-4; 9:12-19; 10:10-13.)

[3] At the time Defendant signed the Guilty Plea Agreement and entered his guilty plea, he was represented by Mia Roberts Perez, his second court-appointed attorney, because he was dissatisfied with his first attorney. As will be noted below, the Court also appointed a third attorney to represent Defendant, Jose Luis Ongay. At this point, both Ms. Perez and Mr. Ongay have appearances entered on Defendant's behalf.

The Court informed Defendant that it would not decide that day whether to accept the Guilty Plea Agreement so it could have time to review the presentence report before making a decision.[4] The Court made clear to Defendant that he has the right to withdraw his guilty plea and go to trial if the Court does not accept the Plea Agreement:

> THE COURT: All right. Now, I want to advise the government and you that I can't say today whether I'll accept the plea agreement.
>
> I want to see—I'm going to order the presentence report. I want to see the presentence report. And then before sentencing, I'll let you know whether I can accept this agreement for the 46 months. All right?
>
> And under your plea agreement, if I accept it, I have to sentence you to 46 months imprisonment, followed by the supervised release that's in here. You can be fined. You'd have to pay a hundred dollar special assessment.
>
> And if I can't—if I don't accept the plea agreement, then you have a right to withdraw your guilty plea and go to trial.
>
> All right? Do you understand what I just said?
>
> THE DEFENDANT: Yes.

(Id. at 13:6-24.)

After reviewing many of the provisions of the Plea Agreement with Defendant (id. at 10:14-24:9), the Court ensured that Defendant was pleading guilty of his own free will:

> THE COURT: All right. Did anyone threaten or force you to plead guilty?
>
> THE DEFENDANT: No one threatened me.
>
> THE COURT: Are you pleading guilty of your own free will?

[4] Defendant and the Government entered into the Guilty Plea Agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). When presented with this type of agreement, a court may "accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A). The Supreme Court has also noted that a court may accept a guilty plea, but defer acceptance of the guilty plea agreement. United States v. Hyde, 520 U.S. 670, 674 (1997) ("Guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time.").

THE DEFENDANT: Yes.

(Id. at 25:13-18.)

Next, the Court explained that both Defendant and the Government have the right to submit objections to the presentence report, but that Defendant does not have the right to withdraw his guilty plea if he disagrees with the contents of the report:

> THE COURT: All right. I want you to understand that if you disagree with what's in the presentence report, your guilty plea will still be binding, and you cannot change your plea from guilty to not guilty.
>
> Do you understand?
>
> THE DEFENDANT: I do.

(Id. at 32:11-17.)

The Court stated that it would calculate which sentencing guidelines apply after it reviews the presentence report, and both Defendant and the Government can make recommendations, motions, and requests to influence the Court's decision. (Id. at 32:18-34:7.) The Court made clear to Defendant that he was bound by his guilty plea regardless of whether the Court agreed with the parties' recommendations, motions, and requests. The Court explained, however, that it would have to impose the forty-six-month sentence if it accepts the Guilty Plea Agreement.

> THE COURT: All right. The only thing I'd have to do if I accept your plea agreement is impose the 46 months.
>
> Do you understand?
>
> THE DEFENDANT: I do.

(Id. at 34:8-12.)

The Court then informed Defendant about his right to a trial and the rights he would have at that trial. (Id. at 34:19-38:18.) The Court also made sure Defendant understood that he would be giving up those rights if he pleads guilty and the Court accepts his plea.

THE COURT: Do you understand that by entering a guilty plea and I accepting your guilty plea, there will be no trial and you are giving up forever the right to a trial and the other rights I just explained to you?

THE DEFENDANT: I understand.

THE COURT: Do you understand that you cannot later come to any court and claim that you were not guilty or that your rights had been violated?

THE DEFENDANT: I didn't understand that.

THE COURT: Do you understand that you cannot later come to any court and say that you were not guilty or that your rights had been violated?

THE DEFENDANT: I understand.

THE COURT: Knowing what your rights are if you were to go to trial and that you are giving up those rights by pleading guilty, do you want to give up your right to a trial and plead guilty?

THE DEFENDANT: Yes.

(Id. at 38:19-39:14.)

Next, Assistant U.S. Attorney Emily McKillip recited the facts that the Government would seek to prove at trial, and Defendant admitted these facts were true.

MS. McKILLIP: Your Honor, if this case were to go to trial, the government would introduce evidence of the following facts:

At the times relevant to the Superseding Information, the defendant, Cirilo Flores, was involved in an intimate relationship with a woman named Arelys Miranda. That first name is spelled A-r-e-l-y-s. Last name, M-i-r-a-n-d-a.

That woman had a teenage daughter who was, during part of the events, 14 years old and, subsequently, 15 years old.

This defendant, Cirilo Flores, persuaded his girlfriend, Ms. Miranda, to take sexually-explicit photographs of her minor daughter and send these photographs to the defendant, Cirilo Flores, using the text messaging function of a cellular telephone system.

Each of them—that is, Mr. Flores and Ms. Miranda—had a BlackBerry telephone that used the Sprint network.

> At the defendant's request, Ms. Miranda took pictures of the naked genitals of her minor daughter, ages 14 originally and then 15, and of the naked buttocks while the child was bent over in a position that exposed her genitals. The photographs focused in on the genital area of the minor child.
>
> After taking these photographs, Ms. Miranda sent them to the defendant over the cellular telephone network. At the time, Ms. Miranda was in the Eastern District of Pennsylvania. The defendant was in North Carolina.
>
> Approximately 22 photographs were sent. There were some photographs that were sent in October of 2010. Others were sent in December of 2010 and others in February of 2011.
>
> Thank you, Your Honor.
>
> THE COURT: All right. Mr. Flores, did you hear what the attorney for the government said the government would show at trial?
>
> THE DEFENDANT: Yes, I heard.
>
> THE COURT: Is that what happened?
>
> THE DEFENDANT: Apparently.
>
> THE COURT: Hmm?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you admit to all those facts?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And did you do what the government says you did?
>
> THE DEFENDANT: Yes.

(Id. at 44:21-46:20.)

After Defendant admitted to the facts the Government would seek to prove at trial, the Court made the following findings:

> THE COURT: All right. I find that Mr. Flores is fully alert, competent, and capable of entering an informed plea.
>
> I find that the plea is knowing and voluntary and not the result of force or threats or any promises apart from the plea agreement disclosed here in open court.

> I find that Mr. Flores has knowingly and voluntarily agreed to the appellate waiver contained in paragraph 10 of his plea agreement.
>
> I find that the plea is supported by an independent basis in fact containing each of the essential elements of the offense to which he is pleading guilty.
>
> I find that he understands the charges, his legal rights, and the maximum possible penalty and the mandatory minimum penalty.
>
> And I find that he understands that he is giving up his right to a trial.

(Id. at 48:24-49:17.)

The Court then once again ensured that Defendant's choice to plead guilty was being made of his own free will.

> THE COURT: Mr. Flores, do you now wish to plead guilty?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is your decision to plead guilty, again, being made of your own free will?
>
> THE DEFENDANT: Yes.

(Id. at 49:18-23.)

The Clerk of the Court then took Defendant's plea, and the Court accepted it.

> THE COURT: All right. The clerk will take the plea.
>
> DEPUTY CLERK: Cirilo Flores, you are charged in Count 1 of Criminal Superseding Information Number 12-186-1, which charges you with possession of child pornography, in violation of Title 18, United States Code, Section 2252(a)(4)(B).
>
> Now, how do you plead to Count 1, not guilty or guilty?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: All right. The defendant's plea of guilty is accepted. I find and adjudge him guilty of the offense.

(Id. at 49:24-50:11.)

C. Defendant's Request to Withdraw His Guilty Plea

A little more than a month after the Court accepted Defendant's guilty plea, Defendant wrote a letter to the Court, dated November 20, 2013, in which he moved to withdraw his guilty plea and have new counsel appointed. (Doc. No. 122 at 2, 4.) He followed this letter with two more, dated November 29, 2013 (Doc. No. 132) and March 5, 2014 (Doc. No. 134), that largely repeated the requests and arguments he made in his November 20, 2013 letter.

On March 7, 2014, the Court held a hearing[5] at which Defendant was appointed a new attorney,[6] his third, to advise him on his Motion to Withdraw His Guilty Plea.[7] (Doc. No. 137 at 28:20-24.) On June 13, 2014, Defendant, through his new counsel, filed a Brief on his Motion to Withdraw His Guilty Plea. (Doc. No. 143.) On August 25, 2014, the Government filed its Response in Opposition to Defendant's Motion. (Doc. No. 145.)[8] Defendant's Motion to Withdraw His Guilty Plea is now ripe for disposition.

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[5] At the March 7, 2014 hearing, the Court in four instances used the word "plea" when it meant to refer to the "plea agreement." (Doc. No. 137 at 8:10-12, 21; 19:4; 23:16.) As explained in Part II.B of this Opinion, the Court accepted Defendant's guilty plea during the October 10, 2013 hearing and informed Defendant that it would not make a decision on accepting the Plea Agreement until after the Court had the opportunity to review the presentence report. As such, the Court's use of the word "plea" in the four instances at the March 7, 2014 hearing was harmless because the Court had already conducted a proper guilty plea colloquy and accepted Defendant's guilty plea at the October 10, 2013 hearing.

[6] The Court appointed Jose Luis Ongay to represent Defendant because he was dissatisfied with his second court-appointed attorney, Mia Roberts Perez. As noted above, both Mr. Ongay and Ms. Perez remain as Defendant's counsel at this time.

[7] Defendant's November 20, 2013 letter in which he asserted that he wanted to withdraw his guilty plea was inadvertently not brought to the Court's attention. As such, the Court proceeded to accept the Guilty Plea Agreement at the March 7, 2014 hearing and to sentence Defendant. At that hearing, the Court was informed about Defendant's request to withdraw his guilty plea.

[8] On September 16, 2014, the Court held another hearing on Defendant's Motion to Withdraw His Guilty Plea. At this hearing, the Court also addressed a letter from Defendant, dated

III. STANDARD OF REVIEW

Under Federal Rule of Criminal Procedure 11(d)(2)(B), a defendant may withdraw a guilty plea after the court accepts the plea, but before it imposes a sentence, if the defendant can show a "fair and just reason" for requesting the withdrawal. A defendant's burden to demonstrate a "fair and just" reason is substantial. United States v. Hyde, 520 U.S. 670, 676-77 (1997); United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2003). A guilty plea "may not automatically be withdrawn at the defendant's whim." United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001). "A shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty." Brown, 250 F.3d at 815 (citation and internal quotation marks omitted).

When deciding whether a defendant has asserted a "fair and just" reason for withdrawing a guilty plea, a district court must consider: (1) whether the defendant asserts his innocence; (2) the strength of the defendant's reasons for withdrawing the plea; and (3) whether the government would be prejudiced by the withdrawal. Jones, 336 F.3d at 252. Where a defendant has failed to make a sufficient showing on the first two prongs of this test, the court may deny the motion to withdraw the guilty plea without considering whether the government would be prejudiced. United States v. Martinez, 785 F.2d 111, 115-16 (3d Cir. 1986).

August 18, 2014, in which he asserted that his third court-appointed attorney is ineffective. (Doc. No. 144.) At the hearing, the Court permitted the parties to submit supplemental memoranda on Defendant's Motion, and even afforded Defendant the opportunity to submit a pro se brief. (Doc. No. 152.) On September 16, 2014, Defendant, through counsel, filed a corrected Brief on Defendant's Motion. (Doc. No. 150.) On October 3, 2014, Defendant filed his pro se Brief in Support of His Motion. (Doc. No. 153.) Finally, on October 9, 2014, the Government filed its Response in Further Opposition to Defendant's Motion. (Doc. No. 154.) The Court has also received a letter from Defendant dated November 5, 2014. This letter will be docketed, and has been considered by the Court in this Opinion.

IV. ANALYSIS

For reasons that follow, Defendant has not carried his burden to assert (1) his innocence and (2) strong reasons for withdrawing his guilty plea. As such, he has not shown a "fair and just" reason for withdrawing his plea. The Court need not consider whether the Government would suffer any prejudice from Defendant's withdrawal. See Martinez, 785 F.2d at 115-16.

A. Defendant Has Not Plausibly Asserted His Innocence

When deciding whether to allow withdrawal of a guilty plea, the first factor a district court must consider is whether the defendant has asserted his innocence. Jones, 336 F.3d at 252. "Bald assertions of innocence," though, are insufficient to permit the defendant to withdraw his plea. Id. "Assertions of innocence must be buttressed by facts in the record that support a claimed defense." Brown, 250 F.3d at 818. The defendant must also "give sufficient reasons to explain why contradictory positions were taken before the district court and why permission should be given to withdraw the guilty plea and reclaim the right to trial." Jones, 336 F.3d at 253 (citation and internal quotation marks omitted).

Here, Defendant has neither buttressed his assertion of innocence with facts in the record nor given sufficient reasons to explain why he took contradictory positions before the Court. As such, he has not carried his burden to assert his innocence.

1. Defendant's Assertion of Innocence Is Not Buttressed by Facts in the Record

Defendant does not support his claim of innocence with any "facts in the record that support a claimed defense." Brown, 250 F.3d at 818. He has made little more than a "bald assertion" of his innocence. Jones, 336 F.3d at 252. In support of his claim, he only argues that

an Internet chat-room conversation between co-defendant Arelys Miranda[9] and an individual named Delores Velez de Leon[10] contains evidence that could exonerate him. (Doc. Nos. 122 at 2; 153 at 3.) He bases this contention on a telephone conversation he had with Ms. de Leon in December 2011, during which he alleges she told him that she had an Internet chat-room conversation with Ms. Miranda that would help him "fight his case." (Doc. No. 153 at 3.)

Apparently, Ms. de Leon did not tell Defendant what was said during this Internet chat-room conversation with Ms. Miranda. Nowhere in his filings does Defendant describe the content of that conversation or explain how it could overcome the evidence of the images sent to Defendant or the testimony of the minor victim that would be presented at trial.

Moreover, Defendant's third court-appointed attorney, Jose Luis Ongay, investigated this claim and determined that it has no merit. (Doc. No. 150 at 11.) Mr. Ongay interviewed Ms. de Leon and concluded that her testimony or any evidence she possesses would not help Defendant's case, but would be detrimental. (Id.) Defendant's claim of innocence, therefore, is not "buttressed by facts in the record."

2. Defendant Has Not Put Forth Sufficient Reasons to Explain Why He Has Taken Contradictory Positions Before the Court

Defendant also fails to sufficiently explain why he has taken contradictory positions before the Court. Defendant argues that he only pled guilty because his will to resist was worn down after his counsel refused his repeated requests to proceed to trial. (Doc. 153 at 4-6.) This claim, though, is fatally undermined by the fact that Defendant personally agreed to continuances of his trial on three separate occasions: November 7, 2012 (Doc. No. 49); April 3, 2013 (Doc.

[9] As noted above, Arelys Miranda was Defendant's girlfriend at the time the events described in the Superseding Information occurred.

[10] Delores Velez de Leon is not further identified in any of the parties' filings.

No. 78); and July 12, 2013 (Doc. No. 87).[11] As noted previously, Defendant also declared twice under oath in court that he was pleading guilty of his own free will. (Doc. No. 136 at 25:16-18; 49:21-23.)

Defendant was afforded every opportunity to proceed to trial. He nonetheless chose to plead guilty. As such, his assertion that he did so only because his resistance was worn down is belied by the record and is unconvincing. Thus, Defendant has not credibly explained why he has taken contradictory positions before the Court.

Because Defendant has neither buttressed his claim of innocence with facts in the record nor put forth sufficient reasons to explain why he took contradictory positions before the Court, Defendant has not plausibly asserted his innocence.

B. Defendant's Reasons for Wanting to Withdraw His Guilty Plea Are Not Strong

The second factor a district court must consider in deciding whether to permit withdrawal of a guilty plea is the strength of the defendant's reasons for wanting to withdraw his plea. Jones, 336 F.3d at 252. In this case, Defendant asserts that his counsel's ineffectiveness caused him to plead guilty. (Doc. No. 122.) In so arguing, Defendant contradicts the statements he made under oath in court and in his Guilty Plea Agreement that he was satisfied with the representation by his counsel. (Doc. Nos. 136 at 9:2-4; 118 at 7.)

To evaluate an ineffective assistance of counsel claim, the court must apply a two-prong test enunciated by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Where the issue is counsel's performance while representing a criminal defendant who pleads guilty, counsel is presumed to have acted reasonably and effectively unless a defendant can show that: (1) counsel's advice was not "within the range of competence demanded of attorneys in criminal

[11] In addition, Defendant made statements in both his Plea Agreement and under oath in court that he was satisfied with his counsel. (Doc. Nos. 136 at 9:2-4; 118 at 7.)

cases" and (2) "there is a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 56, 59 (1985) (citations and internal quotation marks omitted).

A court may first evaluate the second prong of this test, which essentially asks whether a defendant suffered any prejudice as a result of counsel's alleged ineffectiveness. See Strickland, 466 U.S. at 697; United States v. Booth, 432 F.3d 542, 546 (3d Cir. 2005). Therefore, where the issue is counsel's advice rendered in connection with a guilty plea, a defendant's claim fails unless there is a reasonable probability that the defendant would not have pled guilty but for counsel's alleged errors. Thus, in the absence of prejudice, the court need not consider whether counsel's advice was "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56.

Here, Defendant specifically argues that his court-appointed attorneys were ineffective because they (1) failed to proceed to trial in a timely manner in violation of his right under the Speedy Trial Act[12] (Doc. No. 153 at 4-5), (2) never procured the transcript of the allegedly exculpatory Internet chat-room conversation between co-defendant Arelys Miranda and Delores Velez de Leon (id. at 3), and (3) did not afford Defendant an opportunity to personally review the images that the Government proposed to use as evidence against him at trial (id. at 8). Defendant's arguments fail because there is no reasonable probability that Defendant would not have pled guilty but for counsel's alleged errors.[13]

[12] 18 U.S.C. §§ 3161-74.

[13] As noted above, the Guilty Plea Agreement between the Government and Defendant required that a fixed sentence of forty-six months imprisonment be imposed, among other conditions. (Doc. No. 118 at 2.) If Defendant had chosen to proceed to trial under his original Indictment, he would have faced a mandatory minimum of fifteen years imprisonment if convicted on counts 1-4, and a mandatory minimum of five years imprisonment if convicted on

1. Defendant's Argument that His Counsel Refused to Proceed to Trial in Violation of His Right Under the Speedy Trial Act Is Meritless

Defendant first argues that his counsel violated his right under the Speedy Trial Act by refusing to proceed to trial. (Id. at 4-5.) This argument is meritless. As noted above, Defendant signed a waiver of his right under the Speedy Trial Act and consented to continuances on three separate occasions: November 7, 2012 (Doc. No. 49); April 3, 2013 (Doc. No. 78); and July 12, 2013 (Doc. No. 87). Moreover, Defendant was specifically questioned by the Court about giving up his right to a trial when he entered his guilty plea. (Doc. No. 136 at 38:19-39:14.) Defendant was given the opportunity to have a trial, chose not to have one, and agreed to plead guilty. Defendant's claim that his counsel was ineffective because they refused his requests to go to trial is therefore meritless.

2. Defendant Suffered No Prejudice from His Counsel's Alleged Failure to Obtain Transcripts of the Internet Chat-Room Conversation

Next, Defendant claims that an Internet chat-room conversation between co-defendant Arelys Miranda and Delores Velez de Leon does exist and that it contains evidence that would exonerate him. (Doc. No. 153 at 3.) As noted above, he bases his contention on a telephone conversation he had with Ms. de Leon in December 2011, during which she told him that she had an Internet chat-room conversation with Ms. Miranda and that it would help him "fight his case." (Id.) Defendant claims that his attorneys were ineffective because they failed to procure the transcript of this conversation. (Id.)

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counts 5-8. (Doc. No. 1); see also 18 U.S.C. §§ 2251(e), 2252(b)(1). The fact that the sentence agreed upon by the parties in the Guilty Plea Agreement is considerably shorter than the sentence that would have been imposed if Defendant were convicted at trial contributes to the Court's conclusion that Defendant's counsel was not constitutionally ineffective. Because Defendant has not shown a viable defense to any of the charges in either the original Indictment or the Superseding Information, there is no reasonable probability that Defendant would have insisted on going to trial, where he would have faced a much longer sentence than the one he faced by pleading guilty.

Here, Defendant's argument fails because he suffered no prejudice as a result of his counsel's failure to obtain the alleged transcript. There is no reasonable probability that any evidence contained in the transcript, if it even exists, would have changed Defendant's choice to plead guilty. As noted above, Defendant's third court-appointed attorney, Jose Luis Ongay, contacted Ms. de Leon to determine whether she had any exculpatory evidence to present on Defendant's behalf. (Doc. No. 150 at 11.) Mr. Ongay concluded that she did not, and that any evidence she could present actually would be damaging to Defendant. (Id.) Accordingly, if there was an Internet chat-room conversation that contained exculpatory evidence, it would have been revealed to Mr. Ongay during his investigation. No such conversation was produced. Defendant therefore suffered no prejudice. For these reasons, Defendant's ineffective assistance of counsel claim on this ground is without merit.

3. Defendant Suffered No Prejudice by Not Being Afforded the Opportunity to Personally View the Images the Government Proposed to Introduce as Evidence Against Him

The Government afforded Defendant's counsel the opportunity to view the images that the Government proposed to introduce as evidence against Defendant at trial. (Doc. No. 154 at 9.) Defendant argues, though, that his counsel was ineffective because he did not have the opportunity to view the images himself. (Doc. No. 153 at 8.)

Assuming for the sake of argument that Defendant's attorneys did not show him these images, Defendant was not prejudiced because he admitted at the October 10, 2013 hearing, under oath, that he was aware of the content of these images. Assistant U.S. Attorney Emily McKillip recited the facts that Defendant admitted were true.

> MS. McKILLIP: This defendant, Cirilo Flores, persuaded his girlfriend, Ms. Miranda, to take sexually-explicit photographs of her minor daughter and send these photographs to the defendant, Cirilo Flores, using the text messaging function of a cellular telephone system.

> Each of them—that is, Mr. Flores and Ms. Miranda—had a BlackBerry telephone that used the Sprint network.
>
> At the defendant's request, Ms. Miranda took pictures of the naked genitals of her minor daughter, ages 14 originally and then 15, and of the naked buttocks while the child was bent over in a position that exposed her genitals. The photographs focused in on the genital area of the minor child.
>
> After taking these photographs, Ms. Miranda sent them to the defendant over the cellular telephone network. At the time, Ms. Miranda was in the Eastern District of Pennsylvania. The defendant was in North Carolina.
>
> Approximately 22 photographs were sent. There were some photographs that were sent in October of 2010. Others were sent in December of 2010 and others in February of 2011.
>
> Thank you, Your Honor.
>
> THE COURT: All right. Mr. Flores, did you hear what the attorney for the government said the government would show at trial?
>
> THE DEFENDANT: Yes, I heard.
>
> THE COURT: Is that what happened?
>
> THE DEFENDANT: Apparently.
>
> THE COURT: Hmm?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you admit to all those facts?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And did you do what the government says you did?
>
> THE DEFENDANT: Yes.

(Doc. No. 136 at 44:21-46:20.)

Defendant was fully aware of the content of this evidence against him, and having the chance to personally view these images would not have reasonably changed his decision to plead guilty. Defendant's argument, therefore, is unconvincing because he does not show that he suffered any prejudice by not being able to personally view this evidence.

V. CONCLUSION

For the reasons set forth above, Defendant has not demonstrated a "fair and just" reason to withdraw his guilty plea. Defendant has neither plausibly asserted his innocence nor put forth strong reasons for wishing to withdraw his guilty plea. Moreover, because Defendant has failed to meet his burden on these two points, the Court need not consider whether the Government would be prejudiced by Defendant's withdrawal. See United States v. Martinez, 785 F.2d 111, 115-16 (3d Cir. 1986). Defendant's Motion to Withdraw His Guilty Plea will therefore be denied. An appropriate Order follows.